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Matthew D. Savin
IIT Chicago-Kent College of Law

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DYSFUNCTION JUNCTION: SHOULD THE COURTS RETHINK THE FUNCTIONAL APPROACH TO LEGISLATIVE IMMUNITY FOR STATE OFFICIALS?

MATTHEW D. SAVIN*

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INTRODUCTION

In June 2011, a Chicago jury convicted former Illinois Governor Rod Blagojevich of seventeen counts of public corruption.[1] Blagojevich was sentenced to fourteen years, and Illinois residents will now watch their fourth governor serve time in prison on corruption charges.[2] While misconduct by government officials is neither a recent development nor exclusive to Illinois, the much-publicized criminal

* J.D. candidate, 2012, Chicago-Kent College of Law, Illinois Institute of Technology; B.A., 2005, University of Colorado at Boulder. Special thanks to Bill Gray for his valuable insight.

[1] Dan Rushe, *Rod Blagojevich, Former Illinois Governor, Found Guilty of Corruption*, THE GUARDIAN (June 27, 2011), http://www.guardian.co.uk/world/2011/jun/27/rod-blagojevich-barack-obama-senate-seat.

[2] Former Illinois Governors Otto Kerner, Dan Walker, and George Ryan have also served jail time on public corruption charges. *'Sorry' Blagojevich Gets 14-Year Prison Sentence*, THE CHICAGO-SUN TIMES (December 7, 2011), http://www.suntimes.com/news/crime/9300810-418/sorry-blagojevich-gets-14-year-prison-sentence.html.

and civil trials of former governor Blagojevich have provided fodder for proponents of governmental reform.[3]

Legislative immunity ensures that government officials are shielded from civil liability for any conduct within the "sphere of legitimate legislative activity,"[4] and its availability to government officials has long been a staple of our legal system.[5] Though perhaps unpopular among members of the general public, the rationale behind its protection is relatively straightforward: Fear of civil liability cannot be allowed to inhibit legislative action and stymie the democratic process.[6]

To afford such expansive protection necessarily involves a balancing of interests: the public's need for unencumbered legislative action; and the ability of individual citizens to seek redress for egregious, and often criminal abuses of power.[7] Critics of legislative immunity consider it nothing more than a get-out-of-jail free card for corrupt politicians,[8] a greater evil than that which it was meant to avert. Nevertheless, legislative immunity has withstood judicial scrutiny since before the Revolution, and the courts have deemed traditional deterrents—voter disapproval, impeachment, and potential criminal liability—sufficient safeguards against governmental impropriety.[9]

[3] Adriana Colindres, *Illinois Reform Panel's 1st Topic: Open Gov't*, THE STATE JOURNAL-REGISTER (Feb. 23, 2009, 12:11 AM), http://www.sj-r.com/news/x863266035/First-topic-for-Illinois-reform-panel-open-government.

[4] Tenney v. Brandhove, 341 U.S. 367, 376 (1951).

[5] *Id*. at 372.

[6] *Id*. at 373–74; Bogan v. Scott-Harris, 523 U.S. 44, 52 (1998) (stating that "the exercise of legislative discretion should not be inhibited by judicial interference or distorted by the fear of personal liability.").

[7] Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982); *see* Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency, 440 U.S. 391, 405–06 (1979).

[8] This is meant only in the colloquial sense. The common law privilege of legislative immunity does not shield government officials from criminal liability, even for acts related to legislative duties. *See* Gravel v. United States, 408 U.S. 606, 627 (1972) (concluding that the judicially fashioned privilege cannot go so far as to immunize criminal conduct proscribed by and Act of Congress).

[9] *See Harlow*, 457 U.S. at 814.

In *Empress Casino v. Blagojevich*, the Seventh Circuit reaffirmed, and arguably strengthened, the legislative immunity doctrine as it pertains to state officials.[10] In dismissing the federal RICO-conspiracy charges against former Governor Blagojevich, the court prompted a reexamination of the doctrine's applicability to state officials; specifically, whether a state legislative immunity doctrine that affords lesser protection than federal law can be given controlling effect for federal claims brought against State officials.[11] In holding that federal legislative immunity should apply,[12] the Seventh Circuit was forced to maneuver the myriad of political and constitutional concerns that inevitably pervade any discussion of legislative immunity.[13]

Part I of this comment will provide an historical overview of the Speech or Debate Clause and the common law privilege of legislative immunity. Part II of this comment will examine the Supreme Court's functional approach to federal legislative immunity, and its application to government officials in various contexts. Part III of this comment will discuss the sources of legislative immunity in Illinois, including the Illinois Constitution and the Illinois Supreme Court's recent decision in *Jorgensen v. Blagojevich*. Part IV of this comment will provide an overview of the Seventh Circuit's holding in *Express Casino v. Blagojevich*, as well as Judge Posner's dissent. Part V of this comment will argue that the Seventh Circuit was correct in allowing former Governor Blagojevich to invoke federal legislative immunity as a defense to the federal RICO claim against him, and further argue that the application of state-law immunity as a defense to federal claims would be inappropriate as a matter of law and policy.

[10] *See* Empress Casino Joliet Corp. v. Blagojevich, 638 F.3d 519, 532 (7th Cir. 2011), *vacated on other grounds sub nom* Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc., 649 F.3d 799 (7th Cir. 2011).

[11] *See id*.

[12] *Id*.

[13] The Supreme Court alluded to the constitutional taproots of legislative immunity for state legislators in *Tenney v. Brandhove*, stating: "let us assume, merely for the moment, that Congress has constitutional power to limit the freedom of State legislators acting within their traditional sphere. That would be a big assumption." 341 U.S. 367, 376 (1951).

I. HISTORICAL BACKGROUND: THE SPEECH OR DEBATE CLAUSE & FEDERAL LEGISLATIVE IMMUNITY.

The historical development and policy considerations underlying the Speech or Debate Clause of the U.S. Constitution and the common law privilege of legislative immunity overlap considerably,[14] and while the two remain distinct privileges, the preservation of legislative independence is paramount to both.[15] However, legislative immunity is a judicial creation meant to extend the protections of the Speech or Debate Clause to state government officials and the Executive and Judicial branches of government.[16] An historical analysis of both must preface any discussion of legislative immunity and its relevance in the modern political arena.

A. The Speech or Debate Clause

The Speech or Debate Clause represents the culmination of British and Colonial efforts to establish and maintain an independent legislature.[17] Though its text affords immense protection, the Founders exercised deliberate and conspicuous restraint:

> [The Senators and Representatives]…shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from

[14] Supreme Court of Va. v. Consumers Union, Inc., 446 U.S. 719, 732 (1980) ("we have [] recognized that state legislators enjoy common-law immunity from liability for their legislative acts, an immunity that is similar in origin and rationale to that accorded Congressmen under the Speech or Debate Clause.").

[15] *See id*. at 733.

[16] Yeldell v. Cooper Green Hosp., Inc., 956 F.2d 1056, 1061 (11th Cir. 1992).

[17] *Consumers Union*, 446 U.S. at 372. At the outset, it is important to note that Eleventh Amendment sovereign immunity concerns the liability of the state itself for the actions of its governmental officials, rather than the personal liability of the actor. Ex parte Young, 209 U.S. 123, 128 (1908).

> the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.[18]

The inclusion of the Clause in the U.S. Constitution can be traced to the English Parliament of the Sixteenth and Seventeenth Centuries.[19] As the Parliament asserted its independence from the Crown, its members became increasingly adamant in demanding an uninhibited legislature, free from prosecutorial intimidation or condemnation.[20] In 1698, that vision was eventually realized, and the English Bill of Rights was amended to provide: "[t]hat the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament."[21]

At the time of the American Constitutional Convention, the Framers viewed the inclusion of a similar provision in the U.S. Constitution as fundamental to the system of checks and balances.[22] Oft mentioned are the two principles on which the Clause rests: the prevention of Executive or Judicial intrusion into the affairs of the Legislature, and the preservation of legislative independence.[23] Aptly characterized by James Wilson, a member of the Committee of Detail responsible for the provision in the Federal Constitution, were the benefits of what would eventually become the Speech or Debate Clause:

> In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offense.[24]

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[18] U.S. CONST. art. I, § 6, Cl. 1.
[19] Tenney v. Brandhove, 341 U.S. 367, 372 (1951).
[20] *Id.* at 372.
[21] *Id.* (citation omitted).
[22] United States v. Gillock, 445 U.S. 360, 369–70 (1980).
[23] *Id.*; *see* United States v. Brewster, 408 U.S. 501, 507 (1972).
[24] *Tenney*, 341 U.S. at 786.

However, opponents of the Clause admonished the dangers of granting—as they saw it—a constitutional right to corruption.[25]

The narrow construction of the Clause reflects the principal evil that the Founders sought to avert: the undue infringement of the Legislature by the Executive branch.[26] In several infamous cases, Members of Parliament were prosecuted for publicly challenging the authority of the crown, and the Clause was born primarily to prevent similar acts of intimidation by the Executive branch.[27] Thus, the clause was drafted narrowly to confine the privilege to that purpose. It extends only to Members of the U.S. Congress, for speech made in either House, and does not extend to state legislators, administrative officials, the judiciary, or any other government employee who participates in the legislative process.[28]

Given the Founders' predominant concern with preserving the Separation of Powers—i.e. the prevention of Executive

[25] The passage of the parliamentary privilege was immediately followed by the abuse of the privilege by members of Parliament. Comment, *Brewster, Gravel, and Legislative Immunity*, 73 COLUM. L. REV. 125 (1973) [hereinafter *Legislative Immunity*]. As the privilege was extended to the servants of the parliamentary members, the privilege was often sold on the open market. *Id*. However, the most egregious abuses were eliminated by an act of 1770 stripping servants of the privilege. *Id.*

[26] United States v. Helstoski, 442 U.S. 477, 491 (1979) ("The Speech or Debate Clause was designed neither to assure fair trials nor to avoid coercion. Rather, its purpose was to preserve the constitutional structure of separate, coequal branches of government.").

[27] *Tenney*, 341 U.S. at 371 ("In 1668, after a long and bitter struggle, Parliament finally laid the ghost of Charles I, who had prosecuted Sir John Elliot and others for 'seditious' speeches in Parliament."); *Legislative Immunity*, *supra* note 26, at 26 ("during the reign of Queen Elizabeth I, members of the House of Commons who attempted to discuss matters in Parliament distasteful to the crown often found themselves confined to the Tower of London.").

[28] *See* Gravel v. United States, 408 U.S. 606, 625 (1972) (concluding that for the Speech or Debate Clause to reach matters outside either house, they must be an integral part of the communicative process in either House). Advisors and aides to Legislators are protected by the Constitutional privilege under certain circumstances, as they are deemed essential to the legislative process and an extension of the Legislators themselves. *Id*. at 618.

infringement—the Supreme Court has recognized that the Clause was meant primarily to preclude criminal, as opposed to civil liability.[29] However, even for criminal allegations, the Court has allowed judicial inquiry into actions performed by a legislator in the normal exercise of his office, so long as there exists reason to believe that a crime was committed off the floor of Congress.

B. Federal Legislative Immunity

Unlike the Speech or Debate Clause, the principal purpose of legislative immunity is to restrict civil, rather than criminal liability.[30] While in many ways an extension of the constitutional privilege, legislative immunity is a judicial creation.[31] Both the Speech or Debate Clause and common law legislative immunity seek primarily to preserve the independence of the Legislature, however, the danger averted by the common law privilege is not Executive infringement via the prosecution of government officials, but rather the public's undue interference with the efficient operations of government.[32] The burdens of unfettered litigation could distract government officials from their duties, inhibit their discretionary activities, and deter able citizens from public service.[33]

At least in theory, the actual beneficiary of legislative immunity is not the government official under attack, but the general public.[34] The principal purpose of the privilege is not the derivative benefit conferred upon the government official, but the preservation of inhibited legislative action.[35] The immunity that the government official receives is actually the cost that society bears as a means to

[29] *Helstoski*, 442 U.S. at 491.

[30] *See* United States v. Gillock, 445 U.S. 360, 372 (1980) (citation omitted) (stating that judicially fashioned official immunity does not reach so far as to immunize criminal conduct proscribed by an act of Congress).

[31] *See* Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency, 440 U.S. 391, 405 (1979).

[32] *See* Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982).

[33] *Id*. at 816.

[34] *Lake Country Estates*, 440 U.S. at 405.

[35] *Id*.

ensure the efficient operations of government.[36] "Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good."[37] Accordingly, legislative immunity bars claims seeking both monetary and injunctive relief.[38] While the fear of injunctive relief is unlikely to strike fear in the hearts of government officials as monetary damages surely would, incessant claims for injunctive relief would nevertheless pose a significant distraction for government officials and the courts.[39]

The invocation of legislative immunity has arisen primarily within the context of federal claims that impose civil liability for the violation of an individual's constitutional rights, such as §1983 and *Bivens* claims.[40] However, legislative immunity also protects government officials from civil suit for Federal RICO violations, and other statutes that impose civil liability for criminal violations.[41] Consequently, legislative immunity developed primarily within the federal courts as a part of federal law, and the states have had scant opportunity to develop independent doctrines.[42]

II. FEDERAL LEGISLATIVE IMMUNITY: A FUNCTIONAL APPROACH

A. An Improper Purpose Does Not Destroy the Privilege.

Perhaps the most significant aspect of legislative immunity is that the privilege is "absolute," precluding judicial inquiry into the

[36] *Id*.

[37] *Id*. (citation omitted).

[38] Supreme Court of Va. v. Consumers Union, Inc., 446 U.S. 719, 731–34 (1980).

[39] *Cf. id.* at 731–32.

[40] Empress Casino Joliet Corp. v. Blagojevich, 638 F.3d 519, 530 (7th Cir. 2011).

[41] *Id*. at 529.

[42] *See id*. at 530.

subjective motivation of the governmental actor.[43] The "claim of an unworthy purpose does not destroy the privilege."[44] The Supreme Court has recognized absolute immunity for those government officials whose special functions or constitutional status requires complete protection from suit,[45] without regard to the reasonableness of their actions.[46] Absolute immunity has been recognized for judges in their judicial functions, certain high-level executive officials including prosecutors and the President, and of course, government officials acting in a legislative capacity.[47]

As the principal purpose of legislative immunity is to protect government officials from frivolous and vexatious civil suits, to allow inquiry into the subjective intent of the government actor might erode the protection legislative immunity was meant to provide.[48] As Justice Frankfurter noted in *Tenney v. Brandhove*, "The privilege would be of little value if [government officials] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives."[49] Since the reasonableness of a government actor's intent is a question of fact decided by the courts, without absolute immunity, the government official would still bear the significant burden of litigating his good intentions.[50]

In contrast, qualified or "good faith" immunity is an affirmative defense that shields government officials from civil liability for the

[43] Bogan v. Scott-Harris, 523 U.S. 44, 54 (1998) ("Whether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it."); *see also* Tenney v. Brandhove, 341 U.S. 367, 377 (1951).

[44] *Tenney*, 341 U.S. at 377.

[45] Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982).

[46] Kevin R. Cole, Comment, *Civil Rights: A Call for Qualified Legislative Immunity for City Council Members under 42 U.S.C.S. 1983*, 66 WASH. L. REV. 169, 170 (1991).

[47] *Harlow*, 457 U.S. at 807 (citation omitted).

[48] *Tenney*, 341 U.S. at 377.

[49] *Id*.

[50] *See Harlow*, 457 U.S. at 816 (discussing the burdens associated with the subjective element of qualified immunity defenses).

performance of discretionary functions.[51] It serves as the default standard for governmental officials, aside from those officials to whom the Supreme Court has granted absolute immunity,[52] and does not encompass conduct that clearly violates an established statutory or constitutional right of which a reasonable person would have known.[53] Qualified immunity operates as a compromise between citizens' right to seek compensation for injuries stemming from governmental misconduct, and the need to protect of government officials from frivolous litigation and the undue interference with the performance of their official duties.[54] Unlike absolute immunity, the reasonableness of the government official's actions is often dispositive, and a greater number of civil suits survive the summary judgment phase as a result.[55]

B. The "Sphere of Legitimate Legislative Activity"

In 1951, *Tenney v. Brandhove* established the "functional approach" to legislative immunity in the federal courts.[56] Plaintiff Brandhove circulated a petition among members of the California Legislature alleging that the "Tenney Committee" had helped smear the campaign of a San Francisco mayoral candidate, in an attempt to dissuade further appropriations to the Committee.[57] The Committee subsequently conducted hearings, ostensibly to assess the truth of these allegations, but Brandhove refused to testify and was thereby prosecuted for contempt in state court.[58] Brandhove brought a §1983 action against the individual members of the Committee, alleging that the hearing did not serve a "legislative purpose," but was conducted solely to intimidate him and deter the exercise of his constitutional

[51] Gomez v. Toledo, 446 U.S. 635, 641 (1980).
[52] *Harlow*, 457 U.S. at 807.
[53] *Id*. at 818.
[54] *See generally id*.
[55] *Cf. id*. at 816.
[56] *See generally* Tenney v. Brandhove, 341 U.S. 367 (1951).
[57] *Id*. at 370.
[58] *Id*. at 370–71.

right to free speech.[59] The Supreme Court disagreed, holding that state legislators are absolutely immune from civil liability under §1983 for any conduct performed within the "sphere of legitimate legislative activity."[60] In other words, the legislative nature of the conduct, rather than the purpose of the conduct or the particular branch of government to which the government actor belongs, shall dictate the availability of legislative immunity.[61]

1. Legislative Immunity for State, Local and Regional Officials.

Ample Supreme Court precedent has since reaffirmed legislative immunity for state, local, and regional government officials in various contexts.[62] For example, in *Bogan v. Scott-Harris*, Plaintiff brought a § 1983 action against the mayor of Fall River, Massachusetts.[63] Prior to initiating the suit, the plaintiff filed a formal complaint with the city, which accused a subordinate of the mayor of making racially inflammatory comments about her colleagues.[64] While the charges were pending, Mayor Bogan called for the city council to eliminate the Department of Health and Human Services ("DHHS"), of which the plaintiff was the administrator and sole employee.[65] The Plaintiff alleged that the elimination of the DHHS was motivated by racial animus, and in retaliation for the exercise of her free speech in violation of §1983.[66] Writing for the majority, Justice Thomas held that local officials are also entitled to legislative immunity because the policy rationales behind it apply with equal force at the local level.[67] Justice Thomas further concluded that the Mayor's conduct was

[59] *Id*. at 371.
[60] *Id*. 378
[61] *Id*.
[62] *Infra* pp. 11–14.
[63] Bogan v. Scott-Harris, 523 U.S. 44, 47 (1998).
[64] *Id*. at 46.
[65] *Id*.
[66] *Id*.
[67] *Id*. at 52. (recognizing that the time and energy required to defend against a lawsuit are of particular concern at the local level, where the part-time citizen-legislator remains commonplace).

"legislative" because it involved a discretionary, policymaking decision with prospective implications beyond the plaintiff.[68]

The Supreme Court has even extended legislative immunity to regional government officials.[69] In *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, a group of property owners sued the individual members of a state compact between California and Nevada, the Tahoe Regional Planning Agency ("TRPA"), alleging violations of the Takings Clause of the Fifth and Fourteenth Amendments.[70] The agency was responsible for coordinating and regulating the development of the Lake Tahoe Basin, a popular resort area.[71] The plaintiffs alleged that the state compact had adopted land-use ordinances that destroyed the economic value of their property.[72] Despite the fact that the regional legislators were not elected, and therefore unaccountable to the voting public,[73] the Supreme Court allowed legislative immunity to attach, holding that the federal claims did not encompass the recovery of damages from members of a state compact acting in a legislative capacity.[74] Interestingly, the Court alluded to the controlling effect of federal legislative immunity for federal claims, asserting that the legislative immunity doctrine described in *Tenney* reflects an interpretation of federal law, irrespective of the constitutional or statutory provisions of the particular state.[75]

[68] *Id*. at 55–56.

[69] Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency, 440 U.S. 391, 405–06 (1979).

[70] *Id*. at 393–94.

[71] *Id*. at 393.

[72] *Id*. at 394.

[73] *Id*. at 407 (Marshall, J., dissenting) ("[N]o member of the board is directly accountable to the public for his legislative acts. To cloak these officials with absolute protection where control by the electorate is so attenuated subverts the very system of checks and balances that the doctrine of legislative privilege was designed to secure.").

[74] *Id*. at 405.

[75] *Id*. at 404 ("[A]bsolute immunity for state legislators recognized in *Tenney* reflected the Court's interpretation of federal law; the decision did not depend on the presence of a speech or debate clause in the constitution of any State.").

2. Legislative Immunity Beyond the Legislature: Executive Officials.

An equally well-established feature of the functional approach to legislative immunity is that members of all three branches of government may avail themselves of the privilege as it relates to their legislative duties.[76] The availability of legislative immunity to high-ranking executive officials has proven particularly troublesome, given frequent the overlap between legislative and executive duties that often arises.[77] While high-ranking executive officials are entitled to their own form of "executive immunity" for the performance of their executive functions,[78] executive immunity is typically only qualified and offers significantly less protection from suit.[79]

For example, in *Butz v. Economou*, the Supreme Court reiterated the need to extend immunity to high-ranking federal officials of the Executive Branch, but concluded that qualified immunity for high-ranking executives was sufficient to reconcile the competing values involved: the right of citizens to seek damages; and "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority."[80] Similarly, *Scheuer v. Rhodes* involved a § 1983 action against the Governor of Ohio for his deployment of the Ohio National Guard to Kent State University in 1970.[81] The subsequent conflict between the students and the National Guard resulted in the deaths of

[76] *See* Tenney, v. Brandhove, 341 U.S. 376 (1951); *see supra* pp. 11–13 (discussing legislative immunity as applied to local mayors and state compacts).

[77] *Cf.* Smiley v. Holm, 285 U.S. 355, 367–74 (1932) (examining the Executive's role in the legislative process, which includes the signing and vetoing of legislation).

[78] The President of the United States is the only "high-ranking" executive official to be granted absolute immunity for his executive functions, and the Supreme Court has expressly precluded State Governors from invoking absolute immunity for executive functions. Scheuer v. Rhodes, 416 U.S. 232 (1974) *abrogated on other grounds by* Harlow v. Fitzgerald, 457 U.S. 800 (1982).

[79] *Harlow*, 457 U.S. at 807.

[80] Butz v. Economou, 438 U.S. 478, 504–06 (1978).

[81] *Scheuer*, 416 U.S. at 235.

several students.[82] The Supreme Court rejected the Governor's claim of absolute executive immunity, holding that the Governor and his aides were entitled only to qualified, rather than absolute immunity for the exercise of state power.[83]

Of course, executive officials are still entitled to absolute immunity for the performance of their legislative duties.[84] The operative distinction is that high-ranking executive officials are entitled to legislative immunity for their role in the legislative process, but not for conduct taken to implement legislation.[85] Though the Supreme Court has never squarely addressed a legislative immunity claim by a Governor, which the privilege protects the signing or vetoing of legislation by a state Governor may be reasonably inferred.[86] The Supreme Court has recognized that the Governor's signing or vetoing of legislation constitutes a part of the legislative process,[87] and the Court's grant of legislative immunity to local mayors and regional officials for their legislative duties leaves little doubt that State Governors should enjoy the same protection.[88] Furthermore, the Seventh, First, and Eleventh Circuits have held that legislative immunity protects the Governor's signing of legislation.[89]

[82] *Id*. at 233–34.

[83] *Id*. at 247–48.

[84] *E.g.*, Bogan v. Scott-Harris, 523 U.S. 44, 54 (1998); *see also* Bagley v. Blagojevich, 646 F.3d 378, 391–98 (2011) (holding that a state Governor's act of signing or vetoing legislation is a legislative act entitled to absolute immunity).

[85] *Scheuer*, 416 U.S. at 241–42.

[86] *See* Women's Emergency Network v. Bush, 323 F.3d 937, 950 (11th Cir. 2003) (holding that absolute legislative immunity protects a governor's act of signing a bill into law).

[87] *Bagley*, 646 F.3d at 391–98; *Smiley v. Holm*, 285 U.S. 355, 372–73 (1932).

[88] *See Bogan*, 523 U.S. at 55–56; *Bagley*, 646 F.3d at 391.

[89] *See Bagley*, 646 F.3d 378 (upholding the Governor's elimination of a department position through his line-item veto); Torres-Rivera v. Calderon-Serra, 412 F.3d 205 (1st Cir. 2011) (holding that the Governor of Puerto Rico was protected by legislative immunity for signing a bill into law); *Women's Emergency Network*, 323 F.3d at 950.

III. ILLINOIS LEGISLATIVE IMMUNITY: A LESSER STANDARD?

As legislative immunity is a creation of the judiciary, the states are free to develop independent doctrines via State Constitution, statute, or common law.[90] While most states have adopted constitutional provisions that mirror the Speech or Debate Clause,[91] the effect of these provisions on federal claims against state officials remains unclear.[92] The potential conflict between state and federal legislative immunity doctrines was revealed itself in Empress Casino, where the plaintiffs argued that the Illinois Constitution represents the sole source of legislative immunity in Illinois, and that this lesser form of immunity should govern federal claims brought against state officials.[93]

A. The Illinois Constitution

Legislative immunity in Illinois is derived from Article IV of the Illinois Constitution and certain provisions of the Illinois Code of Criminal Procedure.[94] The language of Article 4, Section 12 of the Illinois Constitution clearly resembles that of the Speech and Debate Clause of the U.S. Constitution:

> Except in cases of treason, felony or breach of peace, a member shall be privileged from arrest going to, during, and returning from sessions of the General Assembly. A member

[90] Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency, 440 U.S. 391, 404 (1979).

[91] When *Tenney* was decided in 1951, forty-one of the then forty-eight states had specific provisions in their Constitutions insulating legislators from civil and criminal liability for legislative acts. Tenney v. Brandhove, 341 U.S. 367, 375 n.5 (1951).

[92] *Infra* pp. 17–19.

[93] *Infra* pp. 19–22.

[94] Jorgensen v. Blagojevich, 211 Ill.2d 286, 309–10 (2004). Legislative immunity in Illinois is actually derived from both the Illinois Constitution and the Illinois Code of Criminal procedure, Jorgensen, although only the Illinois Constitution is relevant to the RICO claim against Blagojevich.

> shall not be held to answer before any other tribunal for any speech or debate, written or oral, in either house. These immunities shall apply to committee and legislative commission proceedings.[95]

As with the Speech of Debate Clause of the U.S. Constitution, the provision is limited to actual members of the Legislature.[96] Also of note is the Illinois provision's mention of committee and legislative commission proceedings, which offers greater specificity than the U.S. Constitution.[97] Despite the similarities, the Supreme Court of Illinois—whether intentionally or not—indicated that the Illinois' constitutional provision may preclude additional common law protections.[98]

However, since most invocations of legislative immunity occur within the context of federal claims, the scope of legislative immunity in Illinois remains uncertain, as the state courts of Illinois have had few opportunities to develop, or at least articulate, an independent state doctrine.[99] This is because until recently, the applicability of federal legislative immunity for federal claims was taken as a matter of course even in state court proceedings, and consequently, a definitive distinction between the state and federal doctrines never developed.[100] However, the ambiguity of the Illinois Supreme Court's opinion in *Jorgensen v. Blagojevich* forced the Seventh Circuit to reexamine the extent to which the Illinois Constitution precludes the additional protection of common law legislative immunity, as well as

[95] ILL. CONST. (1970) art. IV, § 12.

[96] ILL. CONST. (1970) art. IV, §12.

[97] *Id.*

[98] *Infra* pp. 16–17 (discussing the Illinois Supreme Court's holding in *Empress Casino*).

[99] *See* Empress Casino Joliet Corp. v. Blagojevich, 638 F.3d 519, 531, *reh'g en banc granted in part, opinion vacated on other grounds* 649 F.3d 799 (7th Cir. 2011) ("…some states have little or no developed jurisprudence in [the area of legislative immunity]. State courts have imported federal common-law immunity doctrine into actions arising under state law.").

[100] *Cf. id.*

the common practice of applying federal legislative immunity to federal claims against state officials.[101]

B. The Impact of Jorgensen v. Blagojevich

The Illinois Supreme Court's 2004 opinion in *Jorgensen* laid the groundwork for the arguable tension between the federal and Illinois legislative immunity doctrines addressed in *Empress Casino*.[102] *Jorgensen* involved a class action brought on behalf of Illinois judges against former Governor Blagojevich and the Comptroller.[103] The Illinois Constitution prohibits any reduction of a judge's salary during his term,[104] and the Compensation Review Board, which the Illinois General Assembly created to determine the salaries of various government officials, established specific salaries for Illinois judges.[105] The judges' salaries included additional annual cost-of-living adjustments ("COLAs").[106] Former Governor Blagojevich, realizing that he lacked the power under the Illinois Constitution to block the judges' COLAs for the 2003 fiscal year from taking effect, instead opted to sign a reduction veto to the appropriations bill, which included the COLAs for that year.[107] Blagojevich reduced the budget under "Personal Services: judges salaries" by an amount slightly greater than that which the COLAs would require, thereby indirectly eliminating them for the 2003 fiscal year.[108]

The Illinois Supreme Court invalidated the reduction veto as a violation of the Illinois Constitution and denied Blagojevich's claim to

[101] *Infra* pp. 18–21.
[102] *Id*.
[103] Jorgensen v. Blagojevich, 211 Ill.2d 286, 293 (2004).
[104] "Judges shall receive salaries provided by law which shall not be diminished to take effect during their terms of office. All salaries and such expenses as may be provided by law shall be paid by the State…" *Id*. (citing ILL. CONST. (1970), art. VI § 14).
[105] *Jorgensen* at 287.
[106] *Id*. at 288–89.
[107] *Id*. at 291.
[108] *Id*. at 291.

legislative immunity.[109] The Court held that the traditional doctrine of legislative immunity does not preclude judicial inquiry into the constitutionality of governmental conduct, even if within the sphere of legitimate legislative activity.[110] Since legislative immunity applies to both monetary damages, as well as injunctive relief,[111] this seemingly innocuous assertion creates somewhat of a legal quagmire: How can the reversal of a Governor's veto—a concededly legislative function—be interpreted as anything other than an award of injunctive relief?

As an additional complication, the majority in *Jorgensen* suggested the existence of a distinct Illinois legislative immunity doctrine when it stated:

> "As a preliminary matter, we note that most of the cases cited by the Governor were decided by federal courts, not the courts of Illinois. In Illinois, legislative immunity is addressed in article IV, section 12, of the Illinois Constitution and section 107-7 of the Code of Criminal Procedure of 1963. Neither of those provisions is applicable to the Governor."[112]

Whether this dictum statement served as an affirmation of an independent Illinois legislative immunity doctrine or simply emphasized the nonbinding effect of federal precedent remains unclear.[113] Whatever its implications, the ambiguity of *Jorgensen* was instrumental in prompting the reexamination of legislative immunity for state officials that occurred in *Empress Casino*.[114]

[109] *Id*. at 311
[110] *Id*. at 310.
[111] Spallone v. United States, 493 U.S. 265, 278 (1990).
[112] *Jorgensen*, 211 Ill.2d at 309–10.
[113] Empress Casino Joliet Corp. v. Blagojevich, 638 F.3d 519, 531 (7th Cir. 2011).
[114] *Infra* pp. 18–21.

IV. *EMPRESS CASINO CORP. V. BLAGOJEVICH*

A. Factual Background & Holding

On May 26, 2006, former Governor Blagojevich signed the 2006 Horse Racing Act into law, which required Illinois's four highest-earning riverboat casinos to pay three percent of their adjusted gross revenue into a segregated fund, the "Horse Racing Equity Trust Fund," for a period of two years.[115] The money deposited into the fund was to be disbursed directly to five Illinois horseracing tracks within ten days of the deposit.[116] In support of the Racing Act, the Illinois General Assembly presented legislative findings detailing the decline of on-track horse wagering since operations commenced on the riverboat casinos in 1992.[117] The findings also touted several benefits to Illinois farmers, breeders, and horseracing fans.[118] Former Governor Blagojevich signed the Act into law in 2006.[119]

In 2008, the United States Attorney for the Northern District of Illinois filed a criminal complaint against Blagojevich alleging, among other things, that Blagojevich accepted payment as *quid pro quo* for signing the 2006 Racing Act into law.[120] In light of the charges, the casinos filed another complaint in the Northern District of Illinois against Blagojevich and the racetracks as individual defendants, which contained two counts: (1) a federal claim conspiracy claim under the Racketeer Influenced and Corrupt Organizations Act ("RICO"); and (2) a state-law claim against all five racetracks seeking a constructive trust to prevent their unjust enrichment from the proceeds of the racketeering scheme.[121] The district court allowed the RICO-

[115] *Empress Casino*, 638 F.3d at 524.
[116] *Id*.
[117] *Id*.
[118] *Id*.
[119] *Id*.
[120] *Id*. at 525.
[121] *Id*. at 526. For the purposes of this article, only the RICO conspiracy count will be discussed. To state a RICO conspiracy claim, the plaintiff must allege: 1) that each defendant agreed to maintain an interest in or control of an enterprise or to participate in the affairs of an enterprise through a pattern of racketeering activity;

conspiracy count to stand, and denied Blagojevich's claim of legislative immunity.[122]

The Seventh Circuit reversed, holding that Blagojevich was entitled to absolute legislative immunity with regard to the RICO-conspiracy claim.[123] The Court rejected the plaintiffs' argument that the Illinois Constitution embodies the sole source of legislative immunity in Illinois and that only state legislative immunity should control the outcome of federal claims brought against state officials.[124] According to the Court, neither the Illinois Constitution, nor the *Jorgensen* opinion, was sufficient to displace a common law privilege so deeply embedded in our nation's history.[125]

B. Judge Posner's Dissent: A Reformulation of Legislative Immunity?

Judge Posner's dissent suggested that the legislative immunity doctrine of Illinois might possibly afford government officials less protection than that of the federal common law.[126] Judge Posner conceded that "when a state actor is sued in federal court for violating a federal statute, whether he is immune from suit by virtue of his official status is a question of federal law, ordinarily federal common law."[127] Judge Posner also conceded that the reason for applying federal common law was to prevent State interference with Federal interests,[128] and were state law to determine the scope of official immunity, nothing would stop the states from interfering with the enforcement of federal statutes such as RICO.[129]

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and 2) that each defendant further agreed that someone would commit at least two predicate acts to accomplish those goals. *Empress Casino Joliet Corp. v. Blagojevich (Empress I)*, 674 F. Supp. 2d 993, 1000 (N.D. Ill. 2009) *rev'd*, 638 F.3d 519 (7th Cir. 2011).

[122] *Empress Casino*, 638. F.3d at 532.

[123] *Id*.

[124] *Id*.

[125] *Id*. at 532–33.

[126] *Id*. at 543 (Posner, J., dissenting).

[127] *Id*. at 541.

[128] *Id*.

[129] *Id*.

However, Judge Posner also emphasized the irony of abrogating a state-law defense that further promotes the enforcement of federal law, musing, "[t]he interest in giving state officers immunity from suit is a state interest. If the state places no value on that interest in a particular setting…there is no reason for a federal court, enforcing a federal statute, to grant the state official immunity from suit."[130] Accordingly, Judge Posner entertained the possibility that Illinois legislative immunity—if distinct from the federal law—should be given controlling effect, as the displacement of state law by federal common law is limited to situations where there is a significant conflict between some federal policy or interest and the use of state law.[131] As no such conflict exists between the Illinois and federal legislative immunity doctrines, the federal government has no significant interest in providing more protection to state officials than the laws of that state would allow.[132]

According to Judge Posner, the ambiguity of *Jorgensen* was sufficient to draw the existing relationship between state and federal immunity doctrines into question, and that the Court should certify to the Illinois Supreme Court the issue of whether legislative immunity in Illinois permits a suit to go forward against a governor when the suit is based on the performance of a legislative act other than a veto for a criminal purpose.[133]

V. ANALYSIS: LET THE STATES CLEAN UP THEIR OWN MESS

A. The Illinois Constitution does not preclude additional protections at common law, whether at the state or federal level

The plaintiff's argument in *Empress Casino* that the Illinois Constitution represents the sole source of legislative immunity in Illinois is simply unfounded. Though perhaps in understated fashion, the majority was correct in suggesting that "[i]t is not at all clear that if

[130] *Id.*
[131] *Id.* at 543.
[132] *Id.*
[133] *Id.* at 541–44.

presented with a proper claim of common-law legislative immunity, the Illinois Supreme Court would limit the immunity to members of the legislature."[134] The plain language of Article IV of the Illinois Constitution alone fails to support any such sweeping conclusion, which would effectively negate several hundred years of legal precedent and raise serious constitutional concerns in the process.[135] Article IV establishes a specific protection for State Legislators; but the absence of an explicit grant of more expansive protections in no way evinces the legislature's intent to preclude additional protections at common law. "The maxim that the inclusion of something negatively implies the exclusion of everything else (*expressio unius est exclusio alterius*) is a dangerous master to follow in the construction of statutes."[136] The assumption that an omission by the legislature was deliberate depends largely upon the context.[137] The plaintiffs' argument rested on the proposition that the Illinois legislature, realizing the ubiquitous nature of legislative immunity at federal common law, would have referenced such immunity in the Illinois Constitution had it meant to confer those same benefits. But an equal—and far more plausible—explanation is that the Illinois legislature simply relied upon a well-established doctrine at common law, and felt it unnecessary to immortalize court precedent as constitutional right.[138]

The resemblance of the Illinois constitutional provision to the Speech or Debate Clause probably demonstrates the Illinois Legislature's intent either to model Illinois law after the federal legislative immunity doctrine, or otherwise incorporate the federal doctrine into Illinois law. In deciding to adopt a constitutional

[134] *Id.* at 532 (majority opinion).

[135] Tenney v. Brandhove, 341 U.S. 367, 376 (1951) ("Let us assume, merely for the moment, that Congress has constitutional power to limit the freedom of State legislators acting within their traditional [legislative] sphere. That would be a big assumption.").

[136] Custis v. Davis, 511 U.S. 485, 501 (1994) (internal quotation omitted).

[137] *Id.* at 502.

[138] *Cf. Tenney*, 341 U.S. at 376 (discussing the unlikelihood that Congress meant for the text of §1983 to abrogate a legal tradition so grounded in history as legislative immunity).

privilege with near identical language, the Illinois Legislature presumably had full knowledge of the relationship between the constitutional privilege and its corollary of legislative immunity at common law.[139] A presumption so compelling should be rebuttable only upon clear and express language to the contrary, either by statute or constitutional amendment. Neither the text of the Illinois Constitution, nor the context within which it was drafted offers any such rebuttal.[140] If the text of the Illinois Constitution is indicative of anything, it is the Illinois legislature's intent to achieve the same cooperative balance in Illinois as exists at the federal level, without even the slightest notion that more expansive protections at common law might be precluded. Article IV of the Illinois Constitution merely provides the minimum protections to which legislators are entitled, leaving more generous protections to the discretion of the courts.

Judge Posner's dissent in *Empress Casino* also overestimates the uncertainty that resulted from the Illinois Supreme Court's holding in *Jorgensen*.[141] *Jorgensen* simply stood for the proposition that, while legislative immunity typically precludes both monetary and injunctive relief, its protective scope may never extend so far as to preclude a facial challenge to the constitutionality a particular piece of legislation.[142] In other words, the Governor's veto in *Jorgensen* was reversed not because its effect was to violate an individual's constitutional rights, but because the veto itself resulted in unconstitutional legislation.[143] As *Jorgensen* acknowledged, the naming of a government official in a civil suit is hardly a novel occurrence when the constitutionality of the governmental action is at issue.[144] Thus, *Jorgensen* does nothing to alter or lessen the degree of

[139] *Cf. id.* at 378–89 ("As other state's joined the Union or revised their Constitutions, they took great care to preserve the principle that the legislature must be free to speak and act without fear of criminal and civil liability.").

[140] ILL. CONST. art. IV, § 1.

[141] Empress Casino Joliet Corp. v. Blagojevich, 638 F.3d 519, 541–44 (7th Cir. 2011) (Posner, J., dissenting).

[142] *See generally* Jorgensen v. Blagojevich, 211 Ill.2d 286, 309–11 (2004).

[143] *Id.*

[144] *Id.* at 310 ("Examples of Illinois governors being joined as defendants in cases seeking declaratory injunctive relief based on alleged violations of state

protection available to Illinois officials from federal suit. To conclude otherwise would leave the courts powerless to overturn unconstitutional legislation, thereby stripping the judiciary of one of its primary functions.[145] Though perhaps not in explicit terms, the courts have routinely recognized the distinction between injunctive relief as a remedy for individual harm, and as a means of invalidating unconstitutional legislation.[146] *Jorgensen* simply reaffirmed what should seem obvious: that legislative immunity cannot operate to preclude judicial inquiry into the constitutionality of legislation.

B. The Illinois Constitution lacks the requisite authority to preclude federal legislative immunity for federal claims.

1. The Preemption Doctrine Does Not Apply

The legal quandary that arose in *Empress Casino* was due in large part to the inapplicability of traditional preemption principles. The Supremacy Clause of the U.S. Constitution allows for federal law to preempt state law if the court determines that there was congressional intent to do so, or if compliance with both federal and state law would be impossible.[147] However, the circumstances in *Empress Casino* were unique in that a state-law defense that affords lesser protection than the federal defense does not necessarily create a conflict—at least in

constitutional and legal requirements are commonplace."); *see also Clinton v. New York*, 524 U.S. 417, 436–41 (1998) (holding the President's veto power under the Line-Item Veto Act unconstitutional).

[145] *See id*. at 310.

[146] *See* Spallone v. United States, 493 U.S. 265 (1990) (Of course, legislators are bound to respect the limits placed on their discretion by the Federal Constitution…and their laws will have no effect to the extent that courts believe them to be unconstitutional.").

[147] Tipton v. Sec'y of Educ., 768 F. Supp. 540, 551 (S.D. W. Va. 1991). Congressional intent to preempt state law may be demonstrated by: 1) express preemption, where express terms in the statutory scheme demand the displacement of state law; 2) implied preemption, where intent may be inferred because the congressional regulation left no room for supplementary state regulation; and 3) conflict preemption, where congress has not entirely preempted state law, though federal law may still preempt state law to the extent that the two conflict. *Id*.

the traditional sense.[148] As Judge Posner recognized in his dissent, a less favorable state-law defense in no way restricts the federal government's ability to enforce federal law, but actually expands the scope of the substantive federal law.[149] Thus, it would seem that preemption principles are inapplicable, as preemption typically refers to the federal law's displacement of state law, not the other way around.[150] Judge Posner seems to suggest that if no conflict exists, then federal preemption of state law is unnecessary.[151]

Such a claim seems tenable at first glance, but it ultimately fails to persuade. Reduced to its essential components, the Posner argument suggests that the lesser state legislative immunity doctrine should not be preempted by federal legislative immunity because it creates no conflict with the federal law, but simultaneously argues that the nonexistence of any conflict warrants the preemption of federal legislative immunity by the state doctrine. This presupposes the federal legislative immunity doctrine's interference with the laws of the state, which under the circumstances in *Empress Casino* could only mean the federal government's interference with a state-law defense. Thus, the plaintiffs and Judge Posner seem to advocate some type of "reverse-preemption."[152] However, this argument falls short in several respects. First, reverse-preemption has been recognized only within the narrow context of insurance disputes, with explicit congressional authorization.[153] Aside from the obvious fact that the claim against form Governor Blagojevich did not involve an insurance dispute, the Federal RICO statute upon which the civil claim against him was brought contains no congressional authorization for the displacement of federal law.[154]

[148] Empress Casino Joliet Corp. v. Blagojevich, 638 F.3d 519, 543–44 (7th Cir. 2011) (Posner, J., dissenting).

[149] *Id*.

[150] Worth v. Universal Pictures, Inc., 5 F. Supp. 2d 816, 820 (C.D. Cal. 1997).

[151] *See Empress Casino*, 638 F.3d at 544.

[152] *See id.* at 543–44.

[153] Riverview Health Inst., LLC v. Med. Mut. of Ohio, 601 F.3d 505, 514 (6th Cir. 2010). Reverse-preemption for insurance disputes is expressly provided for by the McCarren-Ferguson Act.

[154] 18 U.S.C.A. § 1961 *et seq*.

Second, preemption of any kind typically refers to a conflict between substantive, not procedural laws.[155] Thus, to preclude federal legislative immunity as a defense, it would need somehow to conflict with some substantive law of the State.[156] In the same way that a weakened state legislative immunity doctrine does not interfere with the substantive laws of the federal government, a more expansive federal legislative immunity doctrine does not interfere with the substantive laws of the state (at least where the claim is based on federal law). Federal legislative immunity simply affords greater protection from civil liability arising out of the laws of the federal government, which in no way infringes on the substantive laws of Illinois. If the plaintiffs in *Empress Casino* had relied upon, or otherwise incorporated substantive state law into the federal RICO-conspiracy claim, perhaps the controlling effect of Illinois legislative immunity would have carried greater weight with the Seventh Circuit.[157] However, where no such reliance or incorporation occurs, the defendant-state official may avail himself of any applicable federal defenses, including federal legislative immunity.[158]

2. The Preclusion of Federal Legislative Immunity would unfairly prejudice the defendant state-official.

In addition to the lack of legal support for the displacement of federal legislative immunity by the states, given the Seventh Circuit's prior decisions in comparable cases, allowing such displacement for even state legislative immunity doctrines of lesser protective scope

[155] *United States v. Muskovsky*, 863 F.2d 1319, 1330–31 (7th Cir. 1988).

[156] *Id.*

[157] *Id.*; *see also* Young v. United States, 149 F.R.D. 199, 202 (S.D. Cal. 1993) ("Where state law operates of its own force, it is clear that state law supplies the rule of decision. However, when state law becomes, in effect, the federal law by incorporation, the federal law supplies the rule of decision.").

[158] The incorporation of state-law defenses to federal claims could depend upon the particular statute that provides the substantive law. *Cf. Muskovsky*, 863 F.2d at 1331 (holding that the federal RICO-conspiracy statute does not allow the incorporation of state-law defenses).

would have illogical and inequitable consequences. For example, in *Hampton v. City of Chicago* the Seventh Circuit held that conduct wrongful under § 1983 cannot be immunized by the Illinois Tort Immunity Act, which precludes civil liability for certain government officials under Illinois law.[159] The court reasoned that the Supremacy Clause of the U.S. Constitution demands that federal legislative immunity control the outcome of federal claims, given the overriding importance of federal law.[160] Accordingly, the defendant cannot invoke a state-law defense that offers greater protection than the federal law would allow.[161]

Concededly, *Hampton* is distinguishable from *Empress Casino*, as the Illinois Tort Immunity Act afforded greater protection than the federal law in that particular case, which quite obviously would interfere with the enforcement of Federal law.[162] But to allow the result sought by the plaintiffs in *Empress Casino* for state-law defense affords lesser protection would unfairly disadvantage the defendant-state official. The combined effect of such a result and the holding in *Hampton* would produce the following rule: the plaintiff may rely on a federal claim to seek damages, but the defendant would be barred from invoking a perfectly valid federal defense to which he would normally be entitled. Why should the courts, or the states for that matter, endorse an arrangement that allows the plaintiff to benefit from federal law, but denies the defendant the same privilege?

The Seventh Circuit's holding in *United States v. Muskovsky* would create similar problem.[163] In *Muskovsky*, the Court expressly rejected the incorporation of state-law defenses for federal RICO-conspiracy cases.[164] The defendants appealed their criminal convictions under federal RICO-conspiracy charges related to prostitution, claiming that under Illinois law, the defendant cannot be prosecuted for both the substantive and inchoate elements of a

[159] Hampton v. City of Chicago, 484 F.2d 602, 607 (7th Cir. 1973).
[160] *Id*. at 608.
[161] *Id*.
[162] *Id*. at 607.
[163] *Muskovsky*, 863 F.2d at 1330–31.
[164] *Id*. at 1330.

crime.[165] The court disagreed, holding that since the RICO-conspiracy charge was based entirely on federal law, any state-law conspiracy defenses were inapplicable.[166] Furthermore, the court clarified that even if the RICO-conspiracy charge was predicated upon the incorporation of state conspiracy laws, RICO was meant to incorporate only substantive, not procedural laws.[167]

However, *Muskovsky* is also distinguishable from *Empress Casino* in that state-law defense at issue afforded greater protection than the federal defense.[168] But like *Hampton*, the court's decision in *Muskovsky* in combination with the result advocated by the plaintiffs and Judge Posner in *Empress Casino* would unjustly disadvantage the defendant-state official.[169] The defendant would be prohibited from invoking the state-law defense when favorable to his case, but required to invoke the state-law defense if to his detriment. No extensive legal analysis is necessary to reveal the injustice of stacking-the-deck so heavily against the defendant—only an appeal to common sense.

Finally, the state courts of Illinois have also routinely applied federal legislative immunity for federal claims.[170] The state courts' application of federal legislative immunity within the context of federal claims has only two possible explanations: either the Illinois courts have elected to define Illinois legislative immunity according to the federal standard; or the state courts have conceded that only federal legislative immunity is applicable to federal claims. In either case, Illinois courts have dispelled any notion that only the Illinois legislative immunity doctrine—if distinguishable from the federal doctrine at all—precludes additional protections at common law.

[165] *Id*.
[166] *Id*.
[167] *Id*. at 1330–31.
[168] *Id*. at 1330.
[169] *See generally* Empress Casino Joliet Corp. v. Blagojevich, 638 F.3d 519, 541–44 (7th Cir. 2011) (Posner, J., dissenting).
[170] *E.g.*, Redwood v. Lierman, 331 Ill. App. 3d 1073, 1088 (4th Dist. 2002) (examining whether various government officials should be afforded legislative immunity from a §1983 claim according to the standard at federal common law).

C. Public Policy favors the application of federal legislative immunity for federal claims.

While the illegality of mandating weaker state immunity doctrines for federal claims without congressional authorization is clear, the states are nevertheless free to impose weaker doctrines for state-law claims against their own officials.[171] Congress, too, could amend federal statutes such as RICO and § 1983 to provide for express statutory language requiring the courts to acquiesce to the legislative immunity doctrine of the states. As federal legislative immunity is a judicial creation, nothing about this arrangement would offend the Speech or Debate Clause or raise separation of powers concerns.[172] However, the wisdom of implementing such measures is another matter entirely.

1. The States should not dilute common law legislative immunity, even for claims arising under state law.

The deterrent effect of a weakened legislative immunity doctrine for local and state officials would be of only marginal value. Exposure to civil liability undoubtedly has a significant influence on behavior under certain circumstances. However, it would afford only slight benefit atop the extensive reprimands to which public officials are already subjected.[173] As a penalty for malfeasance, governmental officials already bear the threat of voter disapproval, public shame, impeachment, and possible criminal liability.

However, no punishment is of greater deterrent value than the possibility of imprisonment. Despite the protections of both Speech or

[171] Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency, 440 U.S. 391, 404 (1979).

[172] *See* Tenney v. Brandhove, 347 U.S. 367, 376 (1951) (noting that congressional abrogation of common law legislative immunity would raise serious constitutional concerns).

[173] *See* Nixon v. Fitzgerald, 457 U.S. 731, 757 (1982) (concluding that the threat of impeachment adequately offsets the cost of affording absolute immunity to the President); see *Tenney*, 347 U.S. at 378 (noting that the voters are ultimately responsible for discouraging legislative impropriety).

Debate Clause and common law legislative immunity, criminal prosecutions of government officials have been upheld in various contexts.[174] In *United States v. Brewster*, the Supreme Court constructed a narrow interpretation of the Speech or Debate Clause to allow for the criminal prosecution of a former U.S. Senator:

> Our speech or debate privilege was designed to preserve legislative independence, not supremacy. . . . The illegal conduct [in this case] is taking or agreeing to take money for a promise to act in a certain way. There is no need for the government to show that appellee fulfilled the alleged illegal bargain; acceptance of the bribe is the violation of the statute, not performance of the illegal promise.[175]

In other words, the criminal prosecution was allowed to proceed because the punishment was not for the legislative conduct itself, but for the acceptance of money in exchange for the performance of the legislative conduct.[176] The Supreme Court's willingness to allow criminal prosecutions of government officials poses a far greater threat to corrupt politicians than civil liability. The corrupt politician who remains undeterred by the prospect of imprisonment is unlikely to fear civil liability. Continued malfeasance in the face of such dire reprimands exhibits a public official without fear of consequence, or whose arrogance disallows the possibility of getting caught. In either case, the additional threat of civil liability is unlikely to preserve the integrity of public office, and return the government official to the straight and narrow.

The threat of criminal prosecution is not only of greater deterrent value than civil liability, it is also less burdensome to the legislative process. Unlike civil suits initiated by private citizens, the reasonable discretion of the prosecutor serves as a filter for criminal prosecutions, limiting the potential burdens of trial to those actions the government

[174] *E.g.*, United States v. Brewster, 408 U.S. 501, 529–30 (1972).
[175] *Id*. at 525.
[176] *Id*.

deems sufficiently credible.[177] While the Speech or Debate Clause was drafted with a skeptical eye towards prosecutorial intimidation,[178] the Supreme Court has reiterated time and again that legislative immunity is concerned primarily with exposure to civil liability.[179] Thus, there is nothing inappropriate about relying on the Executive branch to prosecute only meritorious criminal allegations.

Whatever the deterrent effect of civil liability, it must also be weighed against the cost to the public.[180] We must remember that the purpose of legislative immunity is not to protect the government official, but to protect the public from the hindrance of his public duties.[181] Holding public officials responsible for their actions and compensating those injured as a result is undoubtedly an important public interest. But allowing such misconduct to go unpunished in the civil courts is a cost we have accepted since the dawn of our legal system, and for good reason: A legislature comprised of those without courage to legislate will surely come at a greater price.[182]

2. Neither Congress nor the courts should allow the state-law legislative immunity to control federal claims.

Notwithstanding the detrimental effect that a weakened legislative immunity doctrine would have on our democratic system, Congress could nevertheless allow state legislative immunity doctrines to control the outcome of federal claims against state officials. The states are free to provide whatever degree of protection they deem appropriate for their own officials,[183] and Congress could easily acquiesce to the wishes of the states by amending federal statutes such as § 1983 and RICO to provide for explicit language to that effect.

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[177] *Id.* at 520.
[178] *Supra* pp. 3–7.
[179] *See* Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982).
[180] *Id.* at 807
[181] *See generally* Tenney v. Brandhove, 341 U.S. 367, 372–79 (1951).
[182] *Id.*
[183] Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency, 440 U.S. 391, 404 (1979).

However, allowing state legislative immunity doctrines to control the outcome of federal claims—even against state officials—would indirectly force the federal government to expend valuable resources pursuing claims at behest of the states, to accomplish what are solely state interests. Just as the federal government has an interest in choosing what claims to pursue, it has a commensurate interest in choosing what claims it wishes not to pursue. Allowing state legislative immunity doctrines to supplant the federal common law would enable the states to piggyback their enforcement responsibilities onto the federal government. Even qualified immunity would fail to mitigate the time and money spent by the federal courts hearing claims Congress had no intention of pursuing.[184] While a federal claim may be brought in state court if provided for by statute,[185] there would be nothing to stop the defendant-government official from removing the case to the federal courts on the basis of federal-question jurisdiction.

Furthermore, this arrangement would disturb the uniformity that federal law typically seeks to achieve. The variance in state-law defenses would indirectly expand the scope of federal statutes in certain states. This would inevitably leave the state officials of certain states more susceptible to federal claims, despite the fact that the lesser state-law defense was presumably developed as a defense to state-law defenses; and thus without any consideration of its effect on federal claims. Thus, the states will have unwittingly exposed their government officials to civil claims through the operation of state law, which would effectively penalize certain states for exercising its constitutional right to state sovereignty.

Finally, the states need not rely on federal statutes to preserve the integrity of those who hold public office within their borders. A state is free to pass any number of laws that mirror those enacted by Congress, as many states have elected to do.[186] Allowing the states' legislative

[184] *Supra* note 58 and accompanying text (discussing the lesser degree of protection that qualified immunity provides and the greater frequency of claims that survive summary judgment).

[185] For example, §1983 allows for claims to be brought in state court. *Cf.*, *e.g.*, Redwood v. Lierman, 331 Ill. App. 3d 1073, 1088 (4th Dist. 2002).

[186] *Lake Country Estates*, 440 U.S. at 404.

immunity doctrines to control the outcome of federal claims is simply unnecessary to protect what are solely state interests.[187] Instead, perhaps a state intent on imposing more stringent penalties for governmental misconduct should consider passing legislation exposing government officials to civil liability. The legislature of that state should have no problem reaching the consensus necessary to pass such legislation if it truly embodies the will of the people. Additional penalties should be implemented through the proper democratic channels within state, not through a clever manipulation of state procedural law. Allowing the states to indirectly expand the substantive laws of the federal government is both inefficient, and a circumvention of the democratic process.

The costs of a weakened legislative immunity doctrine to society are equally clear. Without some filter to separate the meritorious claims from the frivolous, the duties of governmental officials would be significantly hampered.[188] The traditional procedural safeguards for weeding out frivolous claims are inadequate to defendants holding public office, who are undoubtedly the most susceptible to civil suit given their public status and the effect of their official actions on individual citizens. The burden of litigating the frivolous nature of these suits would be overwhelming, wasting the time and resources of both the official under attack and the courts,[189] and the increased exposure to civil liability would do little to influence the conduct of governmental officials. Congress would be ill-advised to amend statutes such as § 1983 or RICO to direct the courts to apply state legislative immunity doctrines.

[187] "State interest" in this case refers to the state's desire to hold their officials to a higher standard than that required by federal law. The federal government also has an interest enforcing its substantive laws.

[188] *Supra* pp. 4–7.

[189] *Supra* note 58.

CONCLUSION

Amid the pervasive governmental corruption of late,[190] the fundamental importance of legislative immunity in safeguarding legislative independence may have been understandably obscured. But the admonitions of the Founders should resonate loudest when times are tough. In the words of Justice Frankfurter: "In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses."[191]

Allowing state-law legislative immunity to control federal claims would destroy a legal tradition spanning the entirety of our nation's history.[192] To expand the federal laws according to the dictates of state constitutions is to ignore the tripartite system of our democracy. The deterrent value of a weakened legislative immunity doctrine, whether at the state or federal level, would fail to justify the inevitable hindrance to the legislative process that would result. Government officials would still be entitled to qualified immunity. Thus, a plaintiff would still have great difficulty obtaining civil damages, yet government officials engaged in legislative activities would bear the significant burden of incessant litigation.

[190] *Supra* note 1.
[191] Tenney v. Brandhove, 341 U.S. 367, 378 (1959).
[192] *Supra* pp. 4–7.